KTS News Sdn Bhd v See Hua Realty Bhd & Anor

HIGH COURT (KUCHING) — COMPANIES WINDING-UP NO 28–03 OF 2004–III/I
HAMID SULTAN JC
25 SEPTEMBER 2007

Civil Procedure — Pleadings — Intitulement — Petition for winding up pursuant to s 218 Companies Act 1965 — Did not state under which subsection of s 218 — Whether fatal

Companies and Corporations — Winding up — Opposition to petition — Irretrievable break down of relationship between two shareholders — Whether there was such a basis in law

The petitioner applied under s 218 of the Companies Act 1965 ('CA 1965') to wind up the company. When the See Hua newspaper business was facing financial difficulties, there was a proposal to rescue the first respondent. Following negotiations between See Hua and KTS Holdings Sdn Bhd, a written points of agreement ('POA') was eventually entered into between the petitioner and the first respondent. Pursuant to the POA, the petitioner conducted the verification exercise to ascertain the value of the assets injected by the first respondent into the company. The verification exercise concluded that there was a shortfall in the value of the assets injected by the first respondent amounting to RM8,564,209 ('shortfall'). The first respondent breached the POA by defaulting in payment of the shortfall and failed and neglected to settle the bad debt despite demands by the petitioner. In crux, the petitioner's petition was based on the allegations that the relationship between two shareholders of the company had irretrievably broken down. And the company was also insolvent. The first respondent contended that: (i) the petitioner had not disclosed under which subsection of s 218 of the CA 1965 the petition for winding up was grounded; (ii) that the petitioner could not rely upon the ground that the second respondent ('the company') had become insolvent or that the relationship between the parties had irretrievably broken down because these grounds had not been pleaded; (iii) that the company was not insolvent.

Held, petition dismissed with costs:

(1) The petition in this case was highly embarrassing, lacked focus and did

not prima facie showed that it merited consideration. Very importantly, the petition or prayer did not state under which subsection of s 218 the petitioner was relying on. Pure allegation 'In all the circumstances, it is just and equitable that the company should be would up' stated in the body of the petition was not sufficient to attract the relevant provision of s 218 per se (see para 10).

(2) Even on merit, the petitioner had not prima facie established from the allegations that there was breakdown of mutual trust and confidence, or the company was insolvent. Further, that there was no basis in law to say that the relationship between the petitioner and the company had irretrievably broken down as both were legal entities and represented by directors. One could not simply attached human element to invoke mutual trust and confidence to legal entities. In addition, insolvency alone could not stand as a ground for winding up order (see paras 13–14).

[Bahasa Malaysia summary

Pempetisyen memohon di bawah s 218 Akta Syarikat 1965 ('AS 1965') untuk menggulungkan syarikat tersebut. Apabila perniagaan suratkhabar See Hua menghadapi masalah kewangan, terdapat satu cadangan untuk menyelamatkan responden pertama. Berikutan perbincangan di antara See Hua dan KTS Holdings Sdn Bhd, satu perjanjian perkara-perkara (PP), akhirnya dimasuki di antara pempetisyen dan responden pertama. Mengikut PP, pempetisyen menjalankan satu latihan pengesahan untuk memastikan nilai aset-aset yang dimasukkan oleh responden pertama kepada syarikat tersebut. Latihan pengesahan tersebut mendapati bahawa terdapat kekurangan pada nilai aset-aset yang dimasukkan oleh responden pertama yang berjumlah RM8,564,209 ('kekurangan tersebut'). Responden pertama telah memungkiri PP tersebut dengan keingkarannya membayar kekurangan tersebut dan gagal atau ingkar menyelesaikan hutang lapuk walaupun dituntut oleh pempetisyen. Pendek kata, petisyen pempetisyen berdasarkan dakwaan bahawa perhubungan di antara dua pemegang-pemegang syarikat tersebut telah mengalami keruntuhan yang tidak dapat dipulihkan. Dan syarikat tersebut juga tidak solven. Responden pertama menegaskan bahawa: (i) pempetisyen tidak menyatakan di bawah sub-seksyen yang manakah s 218 AS bergantung kepada dalam petisyen penggulungan tersebut; (ii) pempetisyen tidak boleh bergantung atas alasan bahawa responden kedua ('syarikat tersebut') telah tidak solven ataupun perhubungan di antara pihak-pihak telah mengalami keruntuhan yang tidak dapat dipulihkan oleh kerana alasan-alasan ini tidak diplidkan; (iii) syarikat tersebut bukannya tidak solven.

Diputuskan, menolak petisyen dengan kos:

(1) Petisyen dalam kes ini adalah amat memalukan, kekurangan fokus dan tidak prima facie menunjukkan ia patut dipertimbangkan. Yang amat penting, petisyen atau permohonan tidak menyatakan di bawah subseksyen yang manakah di s 218 pempetisyen bergantung kepada. Hanya alegasi 'In all the circumstances, it is just and equitable that the company should be would up' yang dinyatakan di badan petisyen tersebut tidak mencukupi bagi membawa kepada peruntukan relevan s 218 per se. (lihat perenggan 10).

(2) Walaupun pada merit, pempetisyen tidak membuktikan secara *prima facie* dakwaan bahawa terdapat keruntuhan saling percaya dan yakin, ataupun syarikat tersebut adalah tidak solven. Lanjutan, tiada dasar undang-undang untuk menyatakan bahawa perhubungan di antara pempetisyen dan syarikat telah runtuh dan tidak boleh dipulihkan oleh kerana kedua-dua adalah entiti undang-undang dan diwakili oleh pengarah-pengarah. Seseorang tidak boleh dengan sesuka hati menyamakan elemen kemanusiaan untuk menggunakan saling percaya dan yakin kepada entiti undang-undang. Tambahan, ketaksolvenan dengan sendirinya tidak boleh berdiri sebagai alasan untuk perintah penggulungan (lihat perenggan 13–14).]

Notes

For cases on opposition to petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1277–1317.

For cases on intitulement generally, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5444–5446.

Cases referred to

Dato' Ting Check Sii v Datuk Haji Mohammad bin Tufail Mahmud & Anor [2007] 7 MLJ 618 (refd)

Legislation referred to

Companies Act 1965 ss 181, 218

Mekanda Singh Sandhu (Sandhu & Co), (George Lo Kuin Fah and James Lo Kuin Chuan with him) (George Lo & Partners) for the petitioner.

Christina Eng (CJ Eng Advocates), (Bong Ah Loi with him) (Suhaili & Bong Advocates) for the respondents.

Alvin Chong (Alvin Chong & Partners) for the provisional liquidators (second respondent).

SY Chan (Ee & Lim Advocates) for the creditor (Malayan Banking Berhad).

Salamah bte Mohd Nawei (Department of Insolvency, Kuching) for the officer receiver.

Hamid Sultan JC:

[1] This is my judgment in respect of the petitioner's application, encl 3 to wind-up the company under s 218 of the Companies Act 1965 ('CA 1965'). The petitioner has not stated the subsection that the petitioner is relying on.

[2] The petition, affidavits and exhibits filed in this action runs to more than 1760 pages. There is a s 181 petition filed by the first respondent (OP–26–02 of 2003–II) which has relevance to the parties in this action, which I have read along with the submissions simultaneously. All parties have agreed that the parties can refer to the affidavit and documents from the other petition for the determination of both the petition. I have also on the date of hearing of the petition informed the parties that I will deal with encl 363 in one judgment. For purpose of dealing with encl 363, it is necessary and essential for me to go through encl 3 and the relevant affidavits filed therein. In consequence of having read encls 3 and 363 and the relevant affidavits in detail, I take the view that it will be prudent for me to deal with encl 363 at the end of my judgment.

[3] The petitioner in the petition inter alia says:

(i) In 1953, Datuk Lau Hui Siong bought a substantial shareholding in two companies whose principal business was the publication of newspapers such as *See Hua Daily News*. He subsequently became the managing director of See Hua Daily News Sdn Bhd. In 1969, the first respondent was set up as the holding company of the See Hua Newspaper business and its related business, which are more particularly described hereunder ('the Group').

(ii) The See Hua Newspaper business consists of the printing and publication of the newspapers and related businesses hereinafter set out:

(a) *See Hua Daily News*, a Chinese daily, circulated in Sabah, Sarawak and Brunei Darussalam.

(b) *The Borneo Post*, an English daily, circulated in Sabah, Sarawak and Brunei Darussalam.

(c) *Utusan Borneo*, a Bahasa Malaysia daily, circulated in Sabah, Sarawak and Brunei Darussalam.

(d) *See Hua Weekly*, a Chinese weekly, circulated as a free supplement to the Sunday edition of *See Hua Daily News* in Sarawak, Sabah and Brunei Darussalam.

The See Hua Newspaper business was at all material times undertaken and housed in certain entities (hereinafter set out) owned by the first respondent.

(iii) In or about the middle of 2000, Datuk Lau Hui Siong approached his elder brother, Dato' Sri Lau Hui Kang in his capacity as executive chairman of KTS Holdings Sdn Bhd to rescue the See Hua Newspaper business (including the related business) from financial collapse. This proposal to rescue the first respondent would have the consequential effect of saving Datuk Lau Hui Siong and his family from their exposure as guarantors for the liabilities of the See Hua Newspaper business and the related business to various financial institutions (which at the material time amounted to about RM32,740,000). From as early as the year 1990, the See Hua Newspapers business was suffering huge and persistent operating losses accumulated at approximately RM35,494,000 as at September 2000 with shareholders funds of the Group having been almost fully eroded and with total liabilities of approximately RM54,648,000 after eliminating intercompany balances. Following negotiations thereafter, between Dato' Lau Hui Siong and his family with Henry Lau Lee Kong in his capacity as managing director of KTS Holdings Sdn Bhd, a written points of agreement ('POA') was eventually entered into between the petitioner and the first respondent dated 6 November 2000. Framework to POA.

(a) The petitioner and the first respondent agreed to engage in a joint business venture involving the See Hua Newspaper business and the related business (including landed properties and certain other related assets of the first respondent, namely paper recycling, collectively described as the ('Assets').

(b) The Assets would be injected by the first respondent into a new company, subsequently identified as the company to operate as an investment holding company to oversee and manage the said Assets (including the See Hua Newspaper business and related business).

(c) The petitioner agreed to inject cash of RM30,000,000 into the company by way of capital contribution.

(d) The shareholding in the company was to be on the basis of 60% to the petitioner and 40% to the first respondent in terms envisaged therein. The Expressed Indemnity Provisions. The petitioner's agreement to enter into the POA and to rescue the first respondent and its operating subsidiaries was solely in reliance on the representations made by the first respondent in relation to the financial position and valuation of the whole Group.

[4] In respect of breakdown of trust and confidence, the petitioner inter alia says:

(i) pursuant to the POA, the petitioner conducted the verification exercise to ascertain the value of the assets injected by the first respondent into the company. The verification exercise concluded that there was a shortfall in the value of the assets injected by the first respondent amounting to RM8,564,209 ('Shortfall'). Pursuant to the POA, the petitioner demanded from the first respondent payment of the Shortfall. The first respondent breached the POA by defaulting in payment of the Shortfall to the petitioner but thereafter agreed to resolve the Shortfall issue upon modified terms.

(ii) Pursuant to cl 19(5) of the POA, the first respondent agreed that it would indemnify the petitioner and/or the company against any part of the accounts receivables of the operating subsidiaries that was not recovered within 12 months of the POA (subject to an allowance of 10%). As at 6 November 2001, a sum in excess of RM5m (nett of the 10% allowance) remained unrecovered (the Bad Debt). The first respondent failed and neglected to settle the Bad Debt despite demands by the petitioner.

(iii) the allegations by the first respondent against the petitioner are set out in Kuching High Court Originating Petition No 26–02 of 2003 II, taken out by the first respondent under s 181 of the CA 1965 (the s 181 petition). The allegations in the s 181 petition are denied and are being vigorously contested. Without going into the merits of the allegations made in the s 181 petition, the first respondent herein has evinced a clear and irrefutable intention to put an end to its relationship with the petitioner as evidenced by the principal reliefs prayed for in the s 181 petition:

(i) that the first respondent's entire shareholding in the company be purchased; or

(ii) in the alternative, that the company be wound up.

[5] In respect of insolvency of the company, the petitioner says that after a review of the consolidated cashflow forecasts of the Group prepared by the management of the company, the external auditors of the Group, namely Messrs Lau & Ling, stated in their report dated 18 March 2004 that unless the Group's cash deficit is addressed urgently, 'the company and its operating subsidiaries may become insolvent as early as April 2004'.

[6] In crux, the petitioner's petition is based on the allegations that the relationship between two shareholders of the company has irretrievably broken down. And the company was also insolvent.

A [7] In response to the petitioner's submission, the first respondent had advanced four main contentions as to why the petition ought to be dismissed and they are as follows:

(i) that this petition ought to be dismissed on the ground that the
B petitioner has not disclosed under which sub-section of s 218 of the CA 1965 the petition for winding up is grounded;

(ii) that the petitioner cannot rely upon the ground that the second respondent (the company) had become insolvent or that the
C relationship between the parties had irretrievably broken down because these grounds have not been pleaded;

(iii) that the company is not insolvent.

D **[8]** In reply, the petitioner says that:

(i) it is admitted that the petitioner has not specified the subsection under s 218 of the CA 1965 in the intitulement of the petition. However, the first respondent has not been misled or prejudiced in any way by the failure to state which subsection of s 218 of the CA 1965 is relied upon
E as a ground for the winding up. Upon reading the petition as a whole and in particular para 8 thereof, it should be apparent that the petitioner was relying upon the just and equitable ground under s 218(1)(i) of the CA 1965.

F By para 8 of the petition, the petitioner prays for the company to be wound up under s 218(1)(i) of the Companies Act. In paras 6 & (7) of the petition, it purports to set out the background to support the grounds for this petition.

G (ii) the petition for winding up is grounded upon:

(i) the breakdown of mutual trust and confidence between the parties arising from the manner in which the first respondent had defaulted in its obligations to indemnify the petitioner for
H the shortfall in the value of assets, injected by the first respondent into the company, its refusal to indemnify the petitioner or the company against the accounts receivables of the operating subsidiaries that were not recovered within 12 months of the POA and the filing of the s 181 petition by
I the first respondent, thereby evincing a clear and irrefutable intention to put an end to the joint business relationship between the two parties; and

(ii) the insolvency of the company based upon the cash flow forecasts, the continuous unilateral advances to the company

by the petitioner and the failure to reach mutual agreement to save the company from insolvency at the EGM held on 19 March 2004.

[9] I am inclined to agree with the first respondent's submissions (i) and (ii). My reasons are as follows:

[10] The petition in this case is highly embarrassing, lacks focus and does not prima facie show that it merits consideration. Very importantly, the petition or prayer does not state under what subsection of s 218 the petitioner is relying on. Pure allegation 'In all the circumstances, it is just and equitable that the company should be would up' stated in the body of the petition is not sufficient to attract the relevant provision of s 218 per se.

[11] The importance of intitulement has been dealt by me on 26 July 2007 in the case of CWU–28–32 of 2006–II *Dato' Ting Check Sii v Datuk Haji Mohammad bin Tufail Mahmud & Anor* [2007] 7 MLJ 618 and the relevant part is reproduced and reads as follows:

> 2. The intitulement and the prayer in the petition do not disclose under what sub-section of s 218 of CA 1965 the petition is grounded on. This by itself can be fatal. In the case of *Cheow Chew Khoon @ Teoh Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, Justice Gopal Sri Ram JCA observed:
>
> > In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or Rule of Court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.
>
> On the facts of the case and the wider interest of justice, I am condoning the irregularity and deciding the petition on the basis that the petitioner is relying on s 218(1)(i) of CA 1965 which deals with just and equitable ground to wind up the company.

[12] In that case, I condoned the irregularity as the body of the petition and the several statements and prayers therein clearly invited the court to consider the provision of s 218(1)(i) of CA 1965. This is not the case in this instance. In consequence, I take the view that the petition ought to be dismissed on this ground alone.

[13] Even on merit, I take the view that the petitioner has not prima facie established from the allegations that there was breakdown of mutual trust and

confidence, or the company was insolvent. Learned authors, *Datta on The Company Law* (4th Ed) at p 861 have set out when courts made winding up orders on 'just and equitable' ground and it reads as follows:

> Courts have made winding up order on 'just and equitable' ground where it found that –
>
> (a) the company was commercially insolvent;
>
> (b) it had assets but they were locked up and not immediately available;
>
> (c) its business could only be run at a loss and insolvency was inevitable;
>
> (d) all the company's capital was lost and the business had come to an end without any prospect of resuscitation;
>
> (e) it was a bubble company;
>
> (f) it was a fraudulent company;
>
> (g) it carried on illegal business;
>
> (h) the company had no bona fide desire to carry on business;
>
> (i) there was justifiable lack of confidence in the conduct and management of the company's affairs;
>
> (j) there was preponderating influence of some shareholders whose conduct required investigation but who prevented resolution being passed for winding up of the company;
>
> (k) there was no properly constituted Board or the directors were fighting amongst themselves;
>
> (l) where substratum had gone or it was impossible to carry on business except at a loss or the liabilities were far in excess of existing and possible assets;
>
> (m) in case of a private company; there were grounds justifying dissolution of a partnership;
>
> (n) where a scheme became unworkable;
>
> In the following cases the courts have refused to make a winding up order on 'just and equitable' ground:
>
> (a) where there were allegations of mismanagement or misappropriation of funds by directors and nothing more;
>
> (b) where there were quarrels and groupings among shareholders;
>
> (c) where there were general or mere allegation of oppression of minority shareholders;

(d) where it was found that the substratum had not wholly gone and the majority of the shareholders opposed winding up;

(e) where petitioner had an alternative remedy;

(f) where winding up order was sought on the ground that the directors were guilty of misconduct and that the majority of shareholders wanted winding up.

(g) where company was running at a loss.

(h) where petition was not motivated by desire to do justice to company or to see that justice was done to shareholders but for private reasons;

(i) where the company's assets were less than its liabilities but nothing more;

(j) where there was deadlock in the management but the allegation were wholly unparticularised.

[14] Further, I do not think that there is basis in law to say that the relationship between the petitioner and the company has irretrievably broken down as both are legal entities and represented by directors. One cannot simply attach human element to invoke mutual trust and confidence to legal entities. In addition, I do not think insolvency alone can stand as a ground for winding up order. I have dealt with this area of law in *Dato' Ting Check Sii* and I do not wish to repeat the principles here.

[15] For reasons stated above, I take the view that the petition must be dismissed with costs to the respondents. The getting up fees shall not exceed RM100,000. If costs cannot be agreed the respondents are at liberty to tax the costs.

[16] In respect of encl 363, I take the view that the respondents are only expressing their complaint in a crude form and such manner ought to have been avoided by the solicitors preparing the affidavit. As I have dismissed the petition, I find that it is not necessary for me to deliberate on encl 363. I take the view that encl 363 must be dismissed. However, the costs of the application must be borne by the first respondent. The getting up fees for the application shall not exceed RM5,000. If costs cannot be agreed the petitioners are entitled to tax their costs. I hereby order so.

Petition dismissed with costs.

Reported by Sally Kee